No. 11746

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

KURT H. KOEHLER and WILLIAM L. BREWSTER, as executors of the last will and testament and codicil thereto of Bertha Koehler, deceased, and as trustees under the last will and testament and codicil thereto of Bertha Koehler, deceased, and KURT H. KOEHLER in his individual capacity,

Appellants,

v.

JAMES E. MARKHAM, as Alien Property Custodian, THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a national banking association, and THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), a national banking association,

Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND

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Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

JURISDICTION

Appellants brought this suit on October 9, 1945, in the United States District Court for the District of Oregon (R. pp. 2-12) to establish their interest, right and title in and to the property vested in James E. Markham, Alien Property Custodian (hereinafter called the "Custodian") by his Vesting Order No. 4780.

Appellants are natural born citizens of the United States and reside in Portland, Multnomah County, Oregon, and neither of them has been or is now an enemy or an ally of an enemy of the United States (R. pp. 74, 93, 95). Jurisdiction in the United States District Court was based upon Section 9(a) of the Trading with the Enemy Act of October 6, 1917, as amended (hereinafter called the "Act") (50 U.S.C.A., Appendix Sec. 9(a)). Section 9(a) of the Act provides that any person not an enemy or an ally of an enemy may, after filing a prescribed notice of claim, institute a suit in equity in the District Court of the United States for the District in which the claimant resides "to establish the interest, right, title or debt so claimed . . ." Section 9(a) of the Act specifically provides that in such a suit the Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant. The prescribed notice of claim was filed by the appellants on October 1, 1945 (R. pp. 9, 63, 101).

The judgment of the District Court, entered on the 28th day of May, 1947 (R. p. 79), determined that the Court was without jurisdiction in that the United States has not consented to be made a co-defendant (R. pp. 73-79). Appellants appealed to this Court on the 22nd day of August, 1947 (R. pp. 79-81). Jurisdiction in this Court to hear the appeal is invoked under Section 17 of the Act (50 U.S.C.A., Appendix Sec. 17).

Pending the trial of this suit, the office of Alien Property Custodian was terminated by Executive Order No. 9788 (11 F.R. 11981) and all property or interests vested in or transferred to the Custodian, including the vested

property involved in this suit, have been transferred to and are now vested in the Attorney General of the United States and are now administered by him or under his control. By stipulation of appellants and appellees and by order of this Court this suit has been continued against Tom C. Clark, Attorney General of the United States, as successor in office of the Custodian, and the said Attorney General has been substituted as an appellee in the place and stead and as successor of the Custodian.

STATEMENT OF THE CASE

Bertha Koehler, herein called the decedent, a citizen of the United States, died on November 20, 1943, a resident of Portland, Multnomah County, Oregon. The decedent left a last will and testament and codicil thereto which were duly admitted to probate by the Circuit Court of the State of Oregon (in probate) and appellants were appointed and thereafter qualified as executors thereof (R. pp. 74, 75).

Pursuant to orders of the said probate court, appellants as executors delivered to themselves as trustees of a trust created by paragraph Third of the said will, as modified by said codicil, one half of the residue of decedent's estate (R. p. 75). One of the beneficiaries of said trust was and is Ilse Schloesser, who at the time of the issuance of the said Vesting Order No. 4780, was a "National" of a designated enemy country, Germany, within the meaning of Section 5(b) of the Act (R. pp. 7, 63, 101).

On or about September 22, 1944, appellants as said executors and trustees filed in the office of the Custodian a report on Form APC-3 (R. pp. 6, 63, 101). Subsequently, under date of March 30, 1945, the said Custodian made his Vesting Order No. 4780 (R. pp. 8, 45, 63, 69-70, 101) vesting the following described property (R. p. 45):

> All right, title, interest and claim of any kind or character whatsoever of Ilse Schloesser, and her heirs and distributees, in and to the estate of Bertha Koehler, deceased, and under clause "Third" of the will of said Bertha Koehler, and paragraph (g) thereof per codicil dated July 11, 1933, including the right to demand from the executors of said estate and from the trustees under said will, payment and delivery of the principal and income of a certain trust fund, for which provision is made in said clause "Third" of said will and said codicil thereto.

On October 1, 1945, appellants filed with the Custodian a notice of their claim under oath relating to the property described in said Vesting Order upon the form prescribed by the Custodian and containing the particulars as required by the Custodian (R. pp. 9, 63, 101).

Rather than make an application to the President of the United States under Section 9(a) of the Act, appellants brought this suit under the provisions of said Section 9(a), to establish their interest, right and title in and to the vested property.

On September 27 and September 29, 1944 (prior to the issuance of the said Vesting Order), appellants as trustees under the will and codicil of decedent deposited with the appellee The Bank of California, National As-

sociation, in a blocked account personal property constituting assets of said trust. This deposit was made pursuant to an order of the said Circuit Court of the State of Oregon for Multnomah County and in accordance with Executive Order No. 8389 (C.C.H. War Law Service, paragraph 14,011) and General License No. 30-A (C.C.H. War Law Service, paragraph 14,333) (R. pp. 4, 63, 66, 69-71). A description of said assets is included in the complaint (R. pp. 5, 25). Upon the making of said deposit, the Federal Reserve Bank of San Francisco, California, issued to appellants as said trustees a license to carry on certain transactions with respect to said blocked account (R. pp. 5, 63, 69-71, 101). On April 23, 1945 (and subsequent to the issuance of said Vesting Order), the said Federal Reserve Bank revoked said license so far as Executive Order No. 8389 was concerned, and authorized appellants to engage in any transaction which might be engaged in if no National of any blocked country had any interest in the property involved (R. pp. 8, 63, 69-71, 101). Appellants have requested appellee The Bank of California, National Association, to deliver to them the assets of said trust so held in said blocked account, but the said appellee has refused to make such delivery in the belief that it was and is forbidden so to do by reason of the terms of the Act (R. pp. 8, 69-71).

The assets of the estate of the decedent distributable by appellants as executors to legatees included 475 shares of the capital stock of appellee The United States National Bank of Portland (Oregon). On July 18, 1944, the date said Circuit Court made its order of distribu-

tion in the estate of the decedent, said capital stock was registered in the stock record books of said appellee The United States National Bank of Portland (Oregon) in the name of the decedent. Appellants have requested said appellee to transfer said 237 shares of stock to appellants as said trustees, but said appellee has refused to transfer said shares in accordance with appellants' request in the belief that it is forbidden so to do by reason of the terms of the Act (R. pp. 6, 63, 67-68).

Appellant Kurt H. Koehler is the son of the decedent and contends in this suit that his rights under the said will and codicil of the decedent are as follows:

If appellant Kurt H. Koehler survives his sister, Ilse Schloesser, and the husband and all children and all lineal descendants of his sister, and if Ilse Schloesser survives her husband and all of her lineal descendants, and if Ilse Schloesser has died or shall die intestate, appellant Kurt H. Koehler will be the person entitled under the statute of the State of Oregon to take and receive all property of said trust; and appellant Kurt H. Koehler is consequently a contingent beneficiary of said trust and under the circumstances recited will be entitled to all of the principal and income of said trust. It is thus appellant Koehler's position that he as an individual, has a contingent interest in the trust property and that the Custodian had neither the right nor the power to vest said interest although by the said Vesting Order the Custodian did vest the interest of appellant Koehler as a possible "heir" of said decedent. Appellee Tom C. Clark, as successor of the Custodian, has denied this contention of appellant Koehler (R. pp. 9, 63).

The Custodian and the appellee Tom C. Clark, Attorney General of the United States, as the Custodian's successor, have consistently taken the position that the said Vesting Order vested the right to the immediate possession and control of the trust property and have demanded possession of said property (R. pp. 61, 77). Because of this position and because the appellants contend that the Vesting Order vests rights greater than those to which the Custodian and the appellee the Attorney General are entitled under the Act, the appellants brought this suit seeking a judgment or decree substantially as follows (R. pp. 10-12):

1. Establishing the right and title of the appellants as trustees of the said trust;

2. Declaring the said Vesting Order to be erroneous and to vest rights greater than the Custodian or the Attorney General has under the Act;

3. Declaring that the appellants' rights as trustees to hold and administer the said trust property are limited only to the extent that they shall be restrained, until it is otherwise determined by a court or competent governmental authority, from distributing to the said Ilse Schloesser or any person claiming through her who, at the time this suit was instituted was, or is at the time of the proposed distribution, an enemy alien as that term is defined under the Act or other applicable law of the United States;

4. Restraining the Custodian and the Attorney General as his successor from taking any action which would interfere with appellants' exercise of their rights as de-

scribed in paragraph 3 above;

5. Directing the appellee The Bank of California, National Association, to deliver to appellants as said trustees on demand the assets of the said trust held by said appellee;

6. Directing the appellee The United States National Bank of Portland (Oregon) to transfer to appellants as said trustees said 237 shares of the capital stock of said appellee;

7. Restraining the appellees from taking any action relating to the assets of said trust adverse to the interests of appellants until the rights and interests of appellants are determined and established.

The appellees The Bank of California, National Association, and The United States National Bank of Portland (Oregon) were named as defendants in this suit because, as hereinabove stated, they hold possession of and refuse to deliver to appellants, as trustees, part of the assets of said trust. Appellants contend that such refusal is not justified by the terms of the Act or the said Vesting Order and wrongfully interferes with their right and duty to administer the assets of the trust.

The case was tried to the Court on January 23, 1947 (R. p. 90). On May 22, 1947, the Court entered its findings of fact (R. pp. 73-77) and the following conclusions of law (R. p. 77):

"I.

"That this suit against the Alien Property Custodian is a suit against the United States.

"II.

"That this Court is without jurisdiction to hear this case, in that the United States has not consented to be made a co-defendant."

Based upon these conclusions, the Court dismissed the case for want of jurisdiction (R. p. 79).

The sole question presented upon this appeal is one of law; that is, whether in this suit, under Section 9(a) of the Act, the Court is without jurisdiction because others than the Custodian (and the Attorney General as his successor) have been joined as defendants.

SPECIFICATIONS OF ERROR

1. The District Court erred in concluding as a matter of law that such Court is without jurisdiction to hear this case in that the United States has not consented to be made a codefendant.

2. The District Court erred in rendering its judgment order dismissing this case for want of jurisdiction.

SUMMARY OF ARGUMENT

1. Under the express language of the pertinent statute (50 U.S.C.A., Appendix, Section 9(a)), the United States has consented to be sued in equity and to be named as a codefendant in such a suit.

2. All the appellees have an interest in the subject matter of the suit and questions of law and fact are

common to all appellees. Accordingly, under the Federal Rules of Civil Procedure (28 U.S.C.A., following Section 723 (c)), and under general principles of equity, all the appellees were properly named defendants in this suit.

3. The pertinent decisions interpreting Section 9(a) of the Act hold directly or by necessary implication that the United States has consented to be a codefendant in a suit under Section 9(a) of the Act and that all persons interested in such a suit should be named defendants.

ARGUMENT

1. The express language of the statute authorizes a suit against the United States and others.

The statute upon which appellants rely in bringing and maintaining this suit is Section 9(a) of the Act. This section reads as follows:

> "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by

the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute *a suit in equity* in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery *by the defendant,* or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit other-

wise terminated." (50 U.S.C.A., Appendix, Section 9(a)) (Italics ours)

It is apparent that by express language the statute authorizes a suit in equity. It is equally apparent that Congress, not only by use of the words "suit in equity" but by other language of the section, has recognized that it may be necessary to name several defendants if a claimant under the section is to be able "to establish the interest, right, title or debt" claimed. To illustrate, the section does not provide that the Custodian or the Treasurer, as the case may be, shall be made *the* defendant. It provides, on the contrary, that the Custodian or Treasurer shall be made *a* party defendant. The use by Congress of the indefinite article indicates the legislative intent that there may be defendants other than the Custodian or Treasurer of the United States.

Further, Section 9(a) of the Act provides that a judgment or decree in favor of the claimant shall be "satisfied by payment or conveyance, transfer, assignment or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States . . ." The inclusion of the words "by the defendant" necessarily contemplates that there may be a defendant other than the Custodian or Treasurer.

It is of course true that

> "Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Federal government is submitted to the courts for judicial determination, and the right to sue is limited to precisely those cases, both in regard to parties and the cause of action, as Congress may prescribe."

54 Am. Jur., United States, Sec. 135, p. 643.

It is equally true, however, that in construing a statute authorizing a suit against the United States

> "The act of Congress must be read 'according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation'."
>
> *Moore v. United States,* 249 U.S. 487, 39 S. Ct. 322, 323 (1919).

While a statutory waiver of sovereign immunity is to be strictly construed, Congressional adoption of broad statutory language authorizing suits against the United States is not to be thwarted by an unduly restricted interpretation. *Canadian Aviator, Ltd. v. United States,* 324 U.S. 215, 65 S. Ct. 639, 643 (1945).

In view of the plain language of the statute and the obvious purpose of Congress to afford claimants thereunder an opportunity to obtain complete relief by a suit in equity, it can hardly be urged that Congress has not authorized the sovereign to be made a co-defendant in such a suit.

2. Under the Federal Rules of Civil Procedure and general principles of equity, all the appellees are necessary or proper parties.

As explained in the Statement of the Case, the Custodian and appellee Tom C. Clark, Attorney General of the United States, as the Custodian's successor, have consistently maintained that the Vesting Order vested

the right to the immediate control and possession of the trust property, and both the Custodian and the Attorney General have demanded possession of said property. Appellants insist that they have the right to possession and control of the trust property and one of the purposes of this suit is to establish that right. The appellee The Bank of California has refused to deliver to appellants assets of the trust which have been deposited in a blocked account with the said appellee. This refusal is based upon said appellee's belief that the Act prohibits such a delivery. One of the purposes of this suit is to determine whether, notwithstanding the Vesting Order and the provisions of the Act, the appellants are entitled to control, possess and administer the trust assets.

In its affirmative answer, the appellee The United States National Bank of Portland (Oregon) has alleged that if the appellants obtain and deliver to said appellee a proper license issued pursuant to General Order 20 of the Custodian (C. F. R., Title 8, Chapter 2, Part 503, Section 503.7), said appellee will deliver to "such persons as are then legally entitled to receive them" the 237 shares of stock of said appellee which are a part of the trust assets (R. p. 67, 68).

General order 20 provides, in effect, for the issuance by the Custodian of a license authorizing a transfer by executors and trustees under a will, of property for the benefit of an enemy national. As the Custodian and his successor, the Attorney General, contend that the assets of the trust must be delivered to them pursuant to the Vesting Order, it is obvious that the appellants can not obtain a license under General Order 20. Furthermore,

the Attorney General insists that he is the person "legally entitled to receive" the above-mentioned shares of stock, whereas the appellants contend in this suit that they are such persons.

From the foregoing summary of the claims of appellants and the several appellees, it is clear that all parties have an interest in the subject matter of this suit. Accordingly, appellants contend that under the Federal Rules of Civil Procedure and under general principles of equity all the appellees are necessary or proper parties.

The Federal Rules are generally applicable to the United States. *United States v. General Motor Corporation, et al.,* (N.D. Ill. E.D. 1942), 2 Fed. R.D. 528, 530.

As stated in 1 Moore's Federal Practice, Sec. 1.05, p. 49:

> "The Federal Rules apply to actions in the district court to which the United States or a state is a party. This is clearly revealed by the fact that Rule 81 makes no exception for such cases, while Rule 4 prescribed the method of serving summons upon the United States and a state, and Rule 12(a) gives the United States 60 days to defend."

In *United States v. Sherwood,* 312 U.S. 584, 61 S. Ct. 767 (1941), the United States Supreme Court implied that the Rules are applicable, within limits, to actions against the United States under the Tucker Act (28 U.S.C.A., Sec. 41 (20)). In this case Sherwood, a creditor (under a New York state court judgment) of one Kaiser, brought an action against the United States and Kaiser for damages claimed to be due Kaiser upon the latter's contract with the Government. The New

York state court had made an order authorizing Sherwood, as judgment creditor, to maintain an action under the Tucker Act, to recover the damages due Kaiser and to apply the recovery to payment of the judgment against Kaiser. Kaiser and the United States were accordingly made defendants. The Circuit Court of Appeals for the Second Circuit held that the question of joinder was procedural and that under the Federal Rules the action could be maintained against both parties. The Supreme Court, however, held that the problem was one of jurisdiction and that the jurisdiction of the district courts under the Tucker Act is limited strictly to suits which could be brought in the Court of Claims, which court does not have jurisdiction to entertain a suit against a defendant other than the United States. With respect to the general application of the Federal Rules to district court actions under the Tucker Act, the court used the following language, which implies that the rules are applicable with respect to such actions:

> "But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C., Sec. 723b; 28 U.S.C.A., Sec. 723b, authorizing this Court to prescribe the rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts." (p. 771)

After noting that suits cannot be brought in the Court of Claims against any defendant other than the United States and that the jurisdiction of district courts under the Tucker Act is concurrent with that of the Court of Claims, the court said further:

> "The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent *may be conditioned,* as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. The jurisdiction thus limited is unaffected by the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, which prescribe the methods by which the jurisdictions of the federal courts is to be exercized, but do not enlarge the jurisdiction." (Italics ours) (p. 772)

Holding that the Federal Rules apply to cases against the United States under the Tucker Act, this Court has stated:

> "Rule 1 of the Federal Rules of Civil Procedure declares that 'These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81.' Cases under Sec. 24 (20) of the Judicial Code, 28 U.S.C.A., Sec. 41 (20), are cases of a civil nature and are not within any of the exceptions stated in Rule 81. Hence these rules govern the procedure in such cases in so far as applicable and not inconsistent with Secs. 5, 6, 7 and 10 of the Tucker Act, 28 U.S.C.A., Secs. 762-765."
>
> *United States v. Gallagher, et al.,* (C.C.A. 9, 1945) 151 F. (2d) 556, 557.

If the Rules apply, generally, to suits against the United States under the Tucker Act, then by analogy they apply to suits under Section 9(a) of the Act in the absence of any statutory language in the Act indicating a contrary intention. Appellants submit that under the Federal Rules the United States was properly made a co-defendant.

Under Rule 19, necessary and indispensable parties must be joined as plaintiffs or defendants. Quoting *Shields v. Barrow,* (1854) 17 How. 130, 15 L. Ed. 158, 160, one text states the following as the most often cited principle for determining who are necessary and indispensable parties:

> " 'Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights in it . . . are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons, not before the court, the latter are not indispensable parties. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and in good conscience' are indispensable parties." 2 Moore's Federal Practice, pp. 2144, 2145.

Although it might be argued that the two banks are not indispensable parties under Rule 19, certainly they are proper parties under Rule 20(a), which reads:

"Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

As stated in 2 Moore's Federal Practice, p. 2183:

"Aside from restrictions of jurisdiction and venue, Rule 20 places but one restriction upon permissive joinder of parties. There must be a common question of law or fact."

The effect of the Federal Rules is well stated in *United States v. American Surety Co. of New York** (D.C., E.D., New York, 1938), 25 Fed. Supp. 700:

"The new rules of procedure are designed to enable the disposition of a whole controversy such as this at one time and in one action, provided all parties can be brought before the Court and the matter decided without prejudicing the rights of any of the parties. There is nothing presently apparent

*Note: On the question of joinder of parties in a suit under the Tucker Act this case is contrary to *United States v. Sherwood*, supra. (See *New Amsterdam Casualty Co. v. United States*, (D.C., W.D., Pa., 1947) 71 Fed. Supp. 155, 156).

> which would substantially prejudice the rights of anyone if these various claims are heard together." (p. 701)

There is nothing apparent in this suit which would substantially prejudice the rights of anyone if the claims of appellants and various appellees are heard together.

The Federal Rules govern, of course, suits in equity as well as actions at law and provide for a single form of action known as a civil action. (Rules 1 and 2, Federal Rules of Civil Procedure following Section 723(c)); 3 Ohlinger's Federal Practice, pp. 4, 5. However, the merging of legal and equitable procedure in the new rules had no effect upon substantive legal rights, and the courts must still apply equitable principles to equitable rights and legal principles to legal rights.

As stated in *Monks v. Hurley* (D. C.D., Mass. 1942), 45 Fed. Supp. 724:

> "The new rules of procedure have abolished the distinction between legal and equitable forms of action. Rule 2, Federal Rules of Civil Procedure. However, the distinction which has been abolished is a procedural and not a substantive one. 1 Moore's Federal Practice, p. 144; 17 Hughes, Federal Practice, Sec. 18563; Bellavance v. Plastic-Craft Novelty Co., D.C., 30 F. Supp. 37, 39; Grauman v. City Company of New York, D.C., 31 F. Supp. 172, 173, 174. Where the subject matter of a civil action is such as would be cognizable exclusively in equity under the old practice, and therefore governed by equitable principles, such principles would be equally applicable to such an action today. The new rules have not abrogated equitable doctrine. . . ." (p. 728)

It is hardly necessary to cite authorities in support of the proposition that in equity all persons having any interest in the suit should be joined either as parties plaintiff or defendant in order that complete relief may be granted. See 39 Am. Jur., Parties, Sec. 36, pp. 903, 905.

As stated in one of the early United States Supreme Court decisions, it is a rule of Chancery that all those against whom a decree can be made shall be brought before the court if they are within its jurisdiction. *Breedlove v. Nicolet,* 32 U.S. 413, 8 L. Ed. 731 (1833).

In equity all persons having an interest in the question to be tried are made parties that the decree may be final as to all matters in litigation. *Thompson v. Roberts,* 65 U.S. 233, 24 How. 233 (1860).

This court has carefully considered the question of parties to equitable suits in *Chicago, M., St. P. & P. R. Co. v. Adams* (C.C.A. 9, 1934), 72 F. (2d) 816, where a suit was dismissed because certain county officers had not been made defendants. Commenting on the question of indispensable parties, the court said:

> "An early and able discussion of the entire question of indispensable parties is to be found in the following oft-quoted passage from the opinion of Mr. Justice Curtis in Shields v. Barrow, 17 How. (58 U.S.) 130, 139, 15 L. Ed. 158. After quoting from Russell v. Clarke's Executors, 7 Cranch, 98, 3 L. Ed. 271, the learned jurist continued: 'The court here points out three classes of parties to a bill of equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court

may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience'.

* * * * *

" 'The general rule in equity is that all persons materially interested, *either legally or beneficially,* in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. . . .'

"Nor is it necessary that the officer's rights be 'injuriously affected' by the court's decree. In Davis v. Henry, (C.C.A. 6) 266 F. 261, 266, the court said: 'The test of indispensability is not whether the decree is bound to injuriously affect the rights of the absent party; it is enough that such absence may

> "leave the controversy in such a situation that the final determination may be inconsistent with equity and good conscience.'' '" (pp. 818-819)

The court found that the officers had a definite legal, if not a beneficial, interest in the subject matter of the suit, and hence should have been made defendants. Here the appellee banks claim the right to possession of a portion of the assets of the trust and hence they have a definite legal interest in the subject matter of this suit. Accordingly, under the general principles of equity all of the appellees have a legal or beneficial interest in the subject matter of the suit and therefore are necessary or proper parties.

If the two appellee banks cannot be joined with the United States as defendants in this suit, the appellants will be required to institute separate suits to compel the banks to deliver the above mentioned assets of the trust to the appellants and to restrain any other disposition of such assets until this suit has been determined. Equity, of course, has jurisdiction to avoid a multiplicity of suits. *Matthews v. Rodgers,* 284 U.S. 521, 52 S. Ct. 217, 221 (1931).

In *Lake Charles Rice Mill Co. v. Pacific Rice Growers' Ass'n* (C.C.A. 9, 1924), 295 Fed. 246, 250, certiorari denied 266 U.S. 602, 45 S. Ct. 90, this Court quoted with approval the following language from *Wyman v. Bowman,* 127 Fed. 257, 263:

> "This court has repeatedly held—and that holding is sustained by the great weight of authority—that a bill in equity against several defendants separately liable either at law or in equity may be

> maintained, in order to avoid a multiplicity of actions at law or of suits in equity, whenever there is a common and decisive point of litigation between the complainant and the defendants, the complainant has no remedy at law as prompt, practical, and efficient to attain the ends of justice as the suit in equity, and the convenience of the complainant in pursuing the single suit in equity is not overcome by the deeper inconvenience of such a course to the defendants."

There is a common and decisive point of litigation between the appellants and appellees, viz., the validity of the Vesting Order and the right of appellees to withhold from the appellants possession of the trust res. Hence, under the multiplicity of suits doctrine this suit is maintainable against all the appellees.

3. The decisions under the Trading with the Enemy Act hold that the United States has consented to be sued under Section 9(a) as a codefendant.

In *Pilger v. Sutherland* (C.A., D.C. 1932), 57 F. (2d) 604, the British property trustee (holding an official position similar to that of the American Alien Property Custodian) sued the Alien Property Custodian *and others* under Section 9(a) of the Trading with the Enemy Act to establish rights in shares of stock of American corporations then held by the American Custodian. Pilger and others intervened, asserting ownership of a part of the shares of stock which the British trustee was seeking to recover. The main suit by the British trustee was dismissed by agreement without prejudice to the continuance of the suit as between the several defend-

ants and the interveners. Later a motion to dismiss the intervening complaint was duly filed upon the grounds, among others, that there was a nonjoinder of indispensable parties. On the question of joinder the court said:

> "One other point remains to be noticed. It is that the bill is defective because of nonjoinder of necessary parties. *Undoubtedly all parties claiming the shares of stock held by the Custodian are necessary parties and must be joined in any litigation affecting the right to the property.* If they cannot legally be made parties, the suit cannot proceed, but we think that section 105 of the District Code (1924), D. C. Code 1929, T. 24, Sec. 378, covers just such a case as this. It declared that publication or personal service of process outside the District may be had against a nonresident in any suit involving a claim or demand to or against any real or personal property within the jurisdiction of the court. There can be no doubt, we think, that the shares of stock which appellants claim were within the jurisdiction of the lower court because they were held by the Alien Property Custodian in Washington in the District of Columbia, and we think that the quoted provision of the Code gave the court complete jurisdiction to assemble all the necessary parties to the end that the right and title to the property might be finally determined. This is what we decided in Jones v. Rutherford, 26 App. D. C. 114, and repeated recently in Doerschuck et al. v. Mellon, 60 App. D. C. 383, 55 F. (2d) 741, decided December 21, 1931.
>
> "We think, therefore, that the plea to the jurisdiction should be overruled, and since, as we have already indicated, the bill shows an equitable title to the shares of stock which are the subject of dispute, *we think the case is one for a court of equity rather than a court of law. Besides, the act of Congress (supra), section 9(a) so provides.*" (Italics ours) (p. 607)

A decree of the Supreme Court of the District of Columbia dismissing the bill was reversed with instructions to reinstate the bill with leave to intervenng defendants to amend by adding necessary parties. The holding of the court was that all persons claiming the particular shares involved were *necessary* parties. In the case at bar if plaintiffs had failed to join the two banks as defendants, the complaint, under the authority of the *Pilger* case, might have been vulnerable to a motion to dismiss for such nonjoinder. The case is direct authority for the proposition that if others than the Custodian are joined as defendants the court has jurisdiction under Section 9(a) of the Act.

On the question of proper parties in a suit under Section 9(a), the *Pilger* case was cited with approval in *Alley v. Clark, Attorney General* (E.D. N.Y. 1947), 71 Fed. Supp. 521. In the *Alley* case the plaintiff brought suit against the Attorney General as successor to the Custodian to establish the plaintiff's interest as a limited partner in certain vested partnership assets. Holding that the suit was subject to dismissal because the remaining partners were indispensable parties, the court said (p. 528):

> "if plaintiff truly has an interest, right or title in the property, then his co-owners are indispensable parties, . . ."

The case of *Jackson, Attorney General, v. Irving Trust Co.,* 311 U.S. 494, 61 S. Ct. 326 (1940), involved a suit under Section 9(a) of the Act against the Custodian and *other defendants,* including a German corporation termed "Z.E.G." Plaintiffs sought to establish

a debt owing to a partnership by Z.E.G. and to have applied in payment thereof a sum which had been seized as enemy property by the Custodian. The corporation Z.E.G. answered, setting up affirmative defenses. The Custodian and the Treasurer of the United States appeared generally and moved to dismiss the bill on the grounds (a) that it affirmatively appeared from the bill that no debt was owing to plaintiff from any enemy whose property had been seized and was then held, (b) that it affirmatively appeared that no debt was owing to plaintiffs by Z.E.G., and (c) that the plaintiffs had not stated facts to entitle them to equitable relief under the provisions of the Act. The Attorney General, the successor to the Custodian, petitioned the Supreme Court to set aside the judgment of the lower court on the ground that the beneficial owner of the claim was an enemy and that the lower court therefore lacked jurisdiction to enter a judgment. On the question of jurisdiction of the federal courts to entertain suits under Section 9 of the Act, the Supreme Court said as follows:

> "Petitioner argues that the judgment was void since it was not authorized by the Trading with the Enemy Act and thus the suit was a suit against the United States to which the United States had not consented and over which, therefore, the District Court had no jurisdiction.
>
> "We hold the argument untenable. There is no question here of the sort presented in United States v. United States Fidelity & Guaranty Company, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894, of want of consent to be sued or of an attempt on the part of officials to waive the sovereign immunity. The United States had expressly consented in Section 9(a) of the Trading with the Enemy Act that suits

might be brought by a non-enemy claimant to have his claim against an enemy debtor satisfied out of the latter's property held by the Alien Property Custodian. The pertinent parts of the section are set forth in the margin.

"The statute provides that any person not an enemy or ally of enemy 'claiming' any interest or right in the property seized or to whom any debt may be owing by the alien enemy may sue the Custodian and Treasurer. He may sue 'to establish the interest, right, title, or debt so claimed'. The court is to determine whether his claim is established. If the claim is 'so established', the court is to order the delivery of property or payment 'to which the court shall determine said claimant is entitled'. *Nothing could be clearer than that in a suit so brought the court is to determine every issue necessary to the establishment of the claim.*

"The suit in question was precisely within the terms of the Act. It was a suit by plaintiffs Sorenson and Nielsen as surviving partners, in which they alleged their citizenship and residence in the United States (and this does not now appear to be questioned), to recover a debt claimed to be owing to the firm by an enemy corporation. The allegations of the bill of complaint met the requirements of the statute in every respect. It set forth the plaintiffs' claim, their non-enemy status, the transactions out of which their claim arose, and that they had given notice of the claim as the statute required. The denials of the answers and the affirmative defenses presented issues which the court was competent to try. All these issues were necessarily before the court in the performance of its statutory duty to determine whether the plaintiffs had established their claim to the debt. Thus, the status of the plaintiffs, of the partnership, and of Siekcken, the deceased partner, the effect of his death, his interest in the assets under the partnership agreement, the nature of the transactions with Z.E.G., whether it

> was indebted to the firm and whether the surviving partners were entitled to recover the debt, that is, every issue which could be litigated in the suit was by the very terms of the Act submitted to the determination of the court." (Italics ours) (pp. 328-330)

In the cited case there was a joinder of defendants other than the Custodian, and the court specifically held that the suit was properly brought under Section 9(a) of the Act and that the lower court had jurisdiction. If in the opinion of the court there was a lack of jurisdiction because of the joinder of the other defendants, the objection would normally have been raised by the court on its own motion. *Matthews v. Rodgers,* supra.

We have found no case which holds that a suit under Section 9(a) of the Act must be brought against the Custodian as the sole defendant.

CONCLUSION

During the trial of this case, the District Court indicated that under the rule of the *Sherwood* decision, supra, the Court was without jurisdiction in that the United States has not consented to be made a co-defendant in a suit under Section 9(a) of the Act, and we believe the District Court's order dismissing this suit was influenced by the *Sherwood* case (R. pp. 102-108). But the jurisdiction of the Court of Claims and the District Court under the statute involved in the *Sherwood* case was restricted to the adjudication of issues between the claimant and the Government and such courts have no jurisdiction to entertain a suit which would require

the determination of rights between parties other than the United States. The jurisdiction of the District Courts under Section 9(a) of the Act is not so restricted, and, indeed, the Act on its face in almost specific terms permits the joinder of defendants other than the Custodian.

Appellants respectfully submit that under Section 9(a) of the Act, the United States has consented to be made a co-defendant and that the District Court erred in dismissing this suit for want of jurisdiction.

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